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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NANCY G. JIMENEZ,

Plaintiff and Appellant,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., et al.,

Defendants and Respondents.

D056325

(Super. Ct. No. 37-2009-00088881-
CU-OR-CTL)

APPEAL from judgments of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

Plaintiff Nancy Jimenez appeals from judgments of dismissal in favor of defendants Mortgage Electronic Registration Systems, Inc. (MERS) and California Reconveyance Company (CRC) on her complaint in which she alleged, inter alia, MERS, CRC and JPMorgan Chase Bank, N.A., (Chase) lacked authority to conduct a nonjudicial foreclosure on a deed of trust for her property, which identified MERS as the "nominee" for the lender and its successors and assigns as well as the beneficiary of the deed.

Taking judicial notice of the "legal effect of" certain recorded documents, the trial court sustained the defendants' demurrers to all but one cause of action and thereafter entered judgments of dismissal as to MERS and CRC. On appeal, Jimenez contends CRC lacked authority to foreclose on her property due to the void nature of the purported assignment of the deed by MERS; that as a result, CRC was not acting in the interest of the true holder of Jimenez's note. She further contends the court erred by judicially noticing the legal effect of the documents submitted by defendants with their papers. Though we agree with Jimenez's latter contention, we nevertheless affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2006, Jimenez executed a promissory note in The Mortgage Store's favor for a \$232,000 loan secured by real property on Florida Street in San Diego, California. The deed of trust securing the note defines the lender as The Mortgage Store and the trustee as First American Title Company. The deed of trust identifies MERS as a "separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns" and provides that MERS "is the beneficiary under this Security Instrument."

After CRC recorded a notice of trustee's sale notifying Jimenez of her default under the deed of trust and the possible sale of her property, Jimenez sued MERS, CRC and Chase for "wrongful initiation of foreclosure," declaratory relief and quiet title. In

her complaint, she also alleged a cause of action against Chase and CRC for violation of the Rosenthal Fair Debt Collection Practices Act (Rosenthal Act or Act, Civ. Code,¹ § 1788 et seq.), and causes of action against Chase alone for violations of section 2943 and the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.).

Jimenez alleges on information and belief that at all times relevant, "MERS has existed only to maintain a database of mortgages registered by its member lenders and to serve as nominee beneficiary under their deeds of trust, sparing the true beneficiaries the trouble and expense of recording assignments of mortgages from the original lender to assigns as the notes are sold in the secondary mortgage market." She alleges, "MERS does not own the promissory notes secured by the mortgages and has no right to payments made on the notes, nor does MERS service mortgage loans or make any decisions regarding them. MERS merely attempts to immobilize the mortgage lien while transfers of the promissory notes and servicing rights continue to occur." According to Jimenez, The Mortgage Store acquired the note for resale and resold it into the secondary mortgage market, where it was sold and resold until it landed in a pool of mortgages that constituted the assets of a "special purpose entity" administered by a trustee, who held legal title to the assets. Jimenez alleges that at all times relevant, the "secondary mortgage market was marked by endemic failures to validly assign and properly document the assignments of mortgages, including mortgages in which MERS was the

¹ All statutory references are to the Civil Code unless otherwise indicated.

nominal beneficiary, so that the actual ownership of beneficial interests in many mortgages became, and remains, difficult or impossible to determine."

Jimenez further alleges that in January 2009, she sought documents concerning her loan from Chase via Washington Mutual,² including a copy of the note; documents reflecting the note's sale, transfer or assignment; and a beneficiary statement and payoff demand statement under section 2943. Two days later, CRC recorded a notice of default and election to sell under Jimenez's trust deed, stating she was in default and it could exercise the power of sale in the trust deed without further notice. Thereafter Jimenez sent several additional requests for the same documents to Chase but did not obtain all of them. Jimenez alleges she "does not know the identity of the Note's beneficial owner, that is, the 'beneficiary' as that term is used in . . . the California Civil Code relating to mortgages and deeds of trust" but she is "informed and believes that a person purporting to be the rightful current beneficiary by virtue of a purported assignment from MERS authorized an agent to cause the above-mentioned Notices to be recorded." Jimenez alleges that The Mortgage Store did not assign the note to MERS and did not authorize MERS or any other person to assign the note to anyone on its behalf; that "the person or entity who directed the initiation of the foreclosure process was not the rightful

² Jimenez alleged that defendant JPMorgan Chase Bank, N.A. "does business in California as Chase and as of September 28, 2008, also as Washington Mutual"

owner of the Note and was acting without the rightful owner's authority."³ Jimenez sought a judicial declaration concerning the interpretation of section 2924 as well as a determination that her interest in the property was free of the lien of the deed of trust.

As to Chase and CRC, Jimenez alleges Chase identified itself to her as a debt collector in a March 2009 letter and that letter, together with CRC's notice of default, constituted attempts to collect a debt in violation of the Rosenthal Act. As to Chase, Jimenez alleges it violated section 2943 by intentionally failing to respond to her requests for documents.

MERS generally demurred on grounds Jimenez's complaint failed to state a cause of action. In part, MERS argued it was a duly appointed beneficiary under the trust deed and as a result had authority to assign the deed of trust in January 2007 to another entity,

³ Defendants criticize Jimenez's allegations made on information and belief as "conclusory suppositions" and an "unarticulated guise" for pleading facts. But it is permissible for a pleader to allege on information and belief facts not within his or her actual or presumed personal knowledge. (See *Dey v. Continental Cent. Credit* (2008) 170 Cal.App.4th 721, 725, fn. 1; *North v. Cecil B. DeMille Productions, Inc.* (1934) 2 Cal.2d 55, 58; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 398, 399, pp. 537-539.) We will, however, disregard as argument, contention or legal conclusions Jimenez's allegations that MERS "spar[es] the true beneficiaries the trouble and expense of recording assignments of mortgages from the original lender to assigns . . . "; MERS "has no right to payments made on the notes"; the "secondary mortgage market was marked by endemic failures to validly assign and properly document the assignments of mortgages . . . so that the actual ownership of beneficial interests in many mortgages became, and remains, difficult or impossible to determine"; and MERS "was not the rightful owner of the Note and was acting without the rightful owner's authority." (E.g., *Foerst v. Hobro* (1932) 125 Cal.App. 476, 478; *Spaulding v. Wesson* (1890) 84 Cal. 141, 142; *Metzenbaum v. Metzenbaum* (1948) 86 Cal.App.2d 750, 754; 4 Witkin, Cal. Procedure, *supra*, § 384, pp. 521-522.)

La Salle Bank,⁴ which in turn recorded a substitution of trustee naming CRC as the new trustee. It asked the court to take judicial notice of the grant deed, deed of trust, notice of default, and a January 27, 2009 assignment providing that MERS "grants, assigns and transfers . . . all beneficial interest under" the deed of trust to La Salle Bank "together with the note or notes therein described and secured thereby" It also asked the court to judicially notice a substitution of trustee recorded on January 27, 2009, in which La Salle Bank, identified as the trust deed's beneficiary, purported to substitute CRC as the trustee. It argued foreclosure was lawfully initiated under sections 2924 to 2924i, permitting the "trustee, mortgagee or beneficiary or any of their authorized agents" to conduct the foreclosure process and allowing a substituted trustee or its agent to record the notice of default and notice of sale. MERS argued Jimenez's quiet title cause of action failed for the absence of a verified complaint and the fact its allegations were contradicted by the judicially noticeable documents.

CRC and Chase generally demurred on the same grounds as MERS and requested that the court take judicial notice of the same documents. They additionally argued Jimenez's Rosenthal Act cause of action failed because Chase, as the trust deed's beneficiary, had the authority to instruct the foreclosure trustee to commence foreclosure and when the beneficial interest was assigned to CRC, CRC possessed the same authority.

⁴ The entity is alleged to be La Salle Bank, N.A., as trustee for Washington Mutual Mortgage Pass Through Certificates WMALT Series 2007-OC1 Trust. We shall refer to that entity as La Salle Bank.

In opposition to the demurrers, Jimenez argued her case centered on the validity and effect of the assignment and substitution of trustee that were the subject of defendants' requests for judicial notice. She maintained a key factual dispute was whether CRC in fact held a beneficial interest in the promissory note secured by the deed of trust, and the documents were not judicially noticeable official records or findings, but merely documents created by the defendants. She argued the court could not take judicial notice of the documents' contents and absent anything to contradict her pleadings it was required to overrule the demurrers to all but the quiet title and section 2943 causes of action. Jimenez sought leave to amend to cure the lack of verification and to "add any such allegations as may be appropriate, if the court sustains the demurrer."

Granting judicial notice "as to the legal effect of the recorded documents," the court tentatively sustained the defendants' demurrers to all but the UCL cause of action without leave to amend. As to those causes of action, it ruled the documents contradicted essential allegations of Jimenez's complaint and Jimenez did not show she could cure the defects by further amendment. It granted Jimenez leave to amend her UCL cause of action. The court thereafter entered judgments of dismissal in favor of MERS and CRC. This appeal followed.

DISCUSSION

I. Standard of Review

The applicable appellate review standards are settled: " 'A demurrer tests the sufficiency of a complaint as a matter of law.' [Citation.] In reviewing the propriety of the sustaining of a demurrer, the 'court gives the complaint a reasonable interpretation,

and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.' " (*Dey v. Continental Cent. Credit, supra*, 170 Cal.App.4th at pp. 725-726.) Plaintiffs bear the burden of proving a reasonable possibility any defects can be cured by amendment. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) The reviewing court independently examines the complaint under this standard. (*McCall v. PacificCare of California, Inc.* (2001) 25 Cal.4th 412, 415; *Dey*, at p. 726.)

If judicially noticeable facts render an otherwise facially valid complaint defective, the complaint is subject to demurrer. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) This rule discourages plaintiffs from filing sham pleadings: "Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts that are judicially noticed.' [Citation.] 'False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded'" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400; accord, *C.R. v. Tenet Healthcare Corp.*

(2009) 169 Cal.App.4th 1094, 1102 [allegations contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity].) However, our review should reflect no concern for whether Jimenez can prove the facts alleged in her complaint. (*California Golf, LLC v. Cooper* (2008) 163 Cal.App.4th 1053, 1064.) " 'The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable.' " (See *Silguero v. Creteguard, Inc.* (2010) 187 Cal.App.4th 60, 64.)

Jimenez makes lengthy arguments as to MERS's role in non-judicial foreclosures without citation to the record. These arguments are unhelpful on our review of the sufficiency of her complaint, given our focus on Jimenez's properly pleaded material facts and exhibits attached to her complaint. (*Zelig v. County of Los Angeles, supra*, 27 Cal.4th at p. 1126; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.).

II. *Propriety of Taking Judicial Notice of the "Effect" of the Recorded Documents*

We begin with Jimenez's challenge to the propriety of taking judicial notice of the "effect" of MERS's recorded assignment to La Salle Bank and La Salle Bank's substitution of CRC as trustee. Defendants sought judicial notice under Evidence Code section 451, subdivision (f), mandating notice of "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute," and subdivisions of Evidence Code section 452 permitting judicial notice of court records (Evid. Code, § 452, subd. (d)), facts and propositions of such common knowledge that they cannot reasonably be the subject of dispute (Evid. Code, § 452,

subd. (g)), and facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination "by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).)

" ' "Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." [Citation.]' [Citation.] ' "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) . . . A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute. [Citation.] Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its *proper interpretation are not subject to judicial notice* if those matters are reasonably disputable.' " (*Unruh-Hazton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364-365; accord, *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 ["When judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable"]; *C.R. v. Tenet Healthcare Corp.*, *supra*, 169 Cal.App.4th at pp. 1103-1104.)

Jimenez argues the statutes cited by defendants do not permit judicial notice of the assignment and trust deed; that none of the statutory grounds were present. We agree. The recorded documents are not court records (Evid. Code, § 452, subd. (d)), and the contents of the documents, purporting to evidence particular transactions, neither constitute nor include "facts and propositions" that would be the subject of Evidence Code sections 451, subdivision (f), and 452, subdivisions (g) or (h). (Compare with *In re*

Marriage of Tammen (1976) 63 Cal.App.3d 927, 931 [taking judicial notice, as a matter of common knowledge, of the proposition that deeds of trust are bought and sold in the course of ordinary business].)

Accordingly, we reject defendants' assertion that judicial notice lies under section 452, subdivision (h), which involves facts that are "widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like. . . ." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.) Defendants argue the assignment from MERS to La Salle Bank and La Salle Bank's substitution of trustee demonstrate facts that are not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, so as to contradict allegations of Jimenez's complaint, including her allegation that "as of April 30, 2009, no assignment of the Note and no Substitution of Trustee had been recorded and . . . none has been recorded since that time." Defendants point also to Jimenez's allegation that "CRC has *not* been duly appointed or duly substituted as trustee by the true beneficiary of the Deed of Trust and therefore has no authority to conduct a sale of the property." They argue the *recording* of the documents accomplished that substitution, and the "*facts* may be considered as business records and an exception to the hearsay rule" that fall within the scope of the sort of facts and propositions included in Evidence Code section 452, subdivision h. Defendants cite no authority for the latter proposition.

Jimenez concedes the propriety of taking judicial notice of the fact of recording. She maintains the court cannot, however, take judicial notice of the key issue here: whether the documents reflect a valid assignment of the promissory note from the original lender (The Mortgage Store) to any of the defendants, a claim that involves the truth of the documents' contents. She argues recordation is not a substitute for evidentiary proof of the truth of the facts asserted in a recorded document. Specifically, she points to her allegation that there is no assignment of the promissory note from the original lender (The Mortgage Store) to any of the defendants, and to the fact that none of the recorded documents show any such assignment. Jimenez further argues the trial court's taking of judicial notice was not harmless error, as these documents were the sole support for its ruling dismissing her causes of action. She emphasizes that our review in any event is de novo, and we are not bound by the trial court's reasoning.

There is authority for the proposition that a court may take judicial notice of "recorded deeds." (*Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549, citing *Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 977 (*Maryland Casualty*) & *Cal-American Income Property Fund II v. County of Los Angeles* (1989) 208 Cal.App.3d 109, 112, fn. 2; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106 (*Poseidon*).) In *Evans*, the plaintiffs did not object to the request and further conceded the truth of the matters evidenced by the deed, and under those circumstances the appellate court upheld the trial court's evidentiary ruling taking judicial notice of a trustee's deed. (*Evans*, at p. 549.) In *Maryland Casualty*, this court, reviewing a summary judgment on an insurance company's declaratory relief complaint,

asked the parties to identify evidence of ownership and took judicial notice of recorded deeds purporting to establish a chain of title so as to decide whether certain entities held interests in property and were subject to an exclusion against insurance coverage. (*Maryland Casualty*, 221 Cal.App.3d at pp. 976-977.) There is no indication in that case that any party objected to the request or disputed the validity of the deeds. *Maryland Casualty* in turn relied on *B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, in which the appellate court took judicial notice under Evidence Code sections 459 and 452, subdivisions (g) and (h) only of the fact that the plaintiff had *filed and recorded* its final subdivision map. (*Id.* at p. 960.) The Court of Appeal in *Cal-American Income Property Fund II* granted the request to judicially notice the Los Angeles County Recorder's recordation of trust deeds as official acts of the executive department under Evidence Code section 452, subdivision (c), a provision not relied upon by defendants here. (*Cal-American Income Property Fund II*, at p. 112, fn. 2.) The appellate court in *Cal-American* did so in view of the fact that the plaintiff, who opposed the request on grounds the documents were not introduced in the lower court, did not question the authenticity of the documents and the parties made reference to the trust deeds and foreclosure proceedings in the proceedings below. (*Ibid.*)

In *Poseidon*, the appellate court observed that under *Maryland Casualty*, judicial notice may be taken of recorded deeds, but cautioned that "the fact a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein. [Citation.] For example, the First Substitution [a substitution of trustee document recorded on July 16, 2004] recites that

Shanley 'is the present holder of beneficial interest under said Deed of Trust.' By taking judicial notice of the First Substitution, the court does not take judicial notice of this fact, because it is hearsay and it cannot be considered not reasonably subject to dispute."

(*Poseidon, supra*, 152 Cal.App.4th at p. 1117.) *Poseidon* involved plaintiff Poseidon Development, Inc.'s complaint for breach of a promissory note in which Poseidon sought to recover, inter alia, expenses associated with its initiation of a nonjudicial foreclosure proceeding. (*Id.* at p. 1109.) The trial court sustained the defendant's demurrers without leave to amend, finding that certain documents, including assignments of the trust deed and note from Poseidon to another mortgage company, showed Poseidon was not entitled to recover fees incurred for the foreclosure because it had assigned the deed of trust and had no right to initiate foreclosure proceedings. (*Id.* at p. 1116.) On appeal, Poseidon challenged the trial court's taking of judicial notice of the fact that the document transferred beneficial interest in the note and trust deed and argued that matter remained subject to dispute. (*Id.* at p. 1117.) The Court of Appeal rejected that argument, noting that the assignment contradicted Poseidon's allegations that it " 'remained the true and rightful owner of the note with the power to foreclose on the deed of trust ' " (*Id.* at p. 1118.) It held the "legal effect [of the assignment] could not be clearer" in that it was "not reasonably subject to dispute that, whatever else occurred, Poseidon gave up and no longer held the beneficial interest under the deed of trust" and thus no longer had the power to substitute the trustee of the deed of trust. (*Ibid.*) Importantly, the Court of Appeal observed that on appeal, Poseidon did not dispute the *validity* of the assignment, only its effect. (*Ibid.*) We take from *Poseidon* that had the plaintiff disputed the *validity*

of the assignment, judicial notice as to whether Poseidon retained the beneficial interest would be a contested factual matter not subject to judicial notice.

Here, we may judicially notice the fact that on January 27, 2009, MERS recorded an assignment of the deed of trust and note to La Salle, which in turn recorded a substitution of trustee document stating it was substituting CRC as the trustee. This would contradict Jimenez's allegation that no assignment of the deed of trust or substitution of trustee had been recorded as of April 30, 2009. However, unlike the plaintiff in *Poseidon*, the gravamen of Jimenez's complaint — reasonably and liberally construing its allegations — challenges the *validity* of the assignments and substitutions. In opposition to the demurrer, she questioned whether CRC in fact held a beneficial interest in the deed of trust and pointed out her complaint challenged the validity of MERS's purported assignment of the note based on factual allegations — which we must accept as true — that The Mortgage Store did not assign the note to MERS or authorize MERS to assign the note to anyone on its behalf, and that MERS is not the note's holder. Because Jimenez disputes MERS's status and its ability to assign the note and also CRC's status as the legitimate trustee, we conclude it is not proper to judicially notice the validity or legal effect of the assignment to La Salle Bank and substitution of trustee to CRC. (*Poseidon*, 152 Cal.App.4th at p. 1117.)

III. *The Complaint Fails to State a Cause of Action Even Assuming the Truth of Jimenez's Allegation That MERS Does Not Hold the Promissory Note*

Though we disregard the truth of the contents of the assignment and substitution of trustee submitted by defendants in support of their demurrer, we nevertheless conclude

Jimenez cannot state causes of action for "wrongful initiation" of foreclosure, declaratory relief, and violations of the Rosenthal Act. Our conclusion mainly turns on the recitals in the deed of trust executed by Jimenez and attached to her complaint, which give precedence to any contrary factual allegations. (*Qualcomm, Inc. v. Certain Underwriters At Lloyd's, London* (2008) 161 Cal.App.4th 184, 191; *Performance Plastering v. Richmond American Homes of California* (2007) 153 Cal.App.4th 659, 665; *Dodd v. Citizen's Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

A. *Wrongful Initiation of Foreclosure*

We have found no California state authority, and Jimenez cites none, identifying or describing the elements of a purported cause of action for "wrongful initiation" of foreclosure.⁵ Her allegations charge in a conclusory fashion that she does not know the note's "beneficial owner"; that the person who directed initiation of the foreclosure is not the "rightful" owner of the note, that CRC is without authority to foreclose, and she has suffered damage "[a]s a result of defendant's wrongful actions" Jimenez admits that the essence of her complaint is that under California law, "only the holder of a beneficial interest in a note can foreclose on the security for that note."

We could reject Jimenez's attempted cause of action merely by disregarding her conclusory pleading. But Jimenez's assertions about the note are unavailing in any event.

⁵ Jimenez does not allege that her property was in fact sold at a foreclosure sale, and her cause of action does not seek to set aside such a sale. In *Hulse v. Ocwen Federal Bank, FSB* (D.Or. 2002) 195 F.Supp.2d 1188, the court suggested that without an actual foreclosure sale, the plaintiff in that case might have no remedy for an alleged initiation of the foreclosure process by the wrong entity. (*Id.* at p. 1204, fn. 5.)

In California, the regulation of nonjudicial foreclosures pursuant to a power of sale is governed by the " 'comprehensive framework' " of sections 2924 through 2924k. (*Melendrez v. D&I Investment, Inc.* (2005) 127 Cal.App.4th 1238, quoting *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830; see also *Ung v. Koehler* (2005) 135 Cal.App.4th 186, 202 [exercise of power of sale in a deed of trust " 'is carefully circumscribed by statute' "]; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 86.) The statutory scheme is intended to be "exhaustive" and courts will not incorporate unrelated provisions into statutory nonjudicial foreclosure proceedings. (See *Moeller*, at p. 834.) Under the scheme, a "trustee, mortgagee or beneficiary or any of their authorized agents" may record the notice of default — the document that initiates the non-judicial foreclosure process. (§§ 2924, subd. (a)(1); see also 2924b(b)(4) ["A 'person authorized to record the notice of default or notice of sale' shall include an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee"].) There is abundant federal authority in accord. (*Morgera v. Countrywide Home Loans* (E.D.Cal. 2010) 2010 WL 160348, *7 [citing cases]; *Linkhart v. US. Bank Nat. Assn.* (S.D.Cal. 2010) 2010 WL 1996895; *Perlas v. Mortgage Elec. Registration Systems, Inc.* (N.D.Cal. 2010) 2010 WL 3079262 ["There is no requirement in California that the foreclosure be initiated by the lender itself"].) Jimenez points to nothing in the framework requiring that the person initiating non-judicial foreclosure proceedings possess a beneficial interest in the note, or be the lender or original note holder.

Jimenez attacks MERS's ability to validly assign the note on grounds it is a nominal beneficiary only of the deed of trust, and is not the holder of the note.⁶ But that allegation is contradicted by the recorded deed of trust attached to her complaint, executed by Jimenez, in which Jimenez agreed that MERS, the designated beneficiary, was also broadly granted the right as the lender's nominee to "exercise *any or all of [the lender's] interests*, including, but not limited to, the right to foreclose and sell the Property; *and to take any action required of Lender . . .*"⁷ (Italics added.) This language empowers MERS to take *any* actions within the lender's authority, including making assignments of the note (as well as the trust deed), contrary to Jimenez's allegations. Because Jimenez's cause of action is premised on MERS's asserted lack of power or authority to assign the promissory note, it fails on grounds her assertion is

⁶ It is true, as Jimenez emphasizes, that a valid assignment requires more than just assignment of the deed; the note must also be assigned. (See *Carpenter v. Longan* (1872) 83 U.S. 271, 274 ["[t]he note and mortgage are inseparable; the former as essential, the latter as an incident"; "[a]n assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity"]; *Kelley v. Upshaw* (1952) 39 Cal.2d 179, 192 [assignment of only the deed without a transfer of the promissory note is completely ineffective]; see also Restatement (3d) of Property (Mortgages) § 5.4 ["[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the *obligation* that the mortgage secures," italics added].) Here, the face of MERS's assignment to La Salle Bank shows MERS identified not just the deed of trust, but also the promissory note.

⁷ More fully, the deed of trust provides: "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

belied by the recitals in the deed of trust, which take precedence over the contrary factual allegations.

B. Declaratory Relief

Jimenez seeks a judicial declaration as to whether, "by necessary implication, [section] 2924[, subdivision] (a) allows a borrower, before his or her property is sold, to bring a civil action in order to test whether the person electing to sell the property is, or is duly authorized to do so by, the owner of a beneficial interest in it." She specifically points to section 2924, subdivision (a)(1)(C), which requires, as part of a notice of default, "[a] statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default."

But this statute merely governs the contents of the notice of default for purposes of allowing a default to be cured and obtain reinstatement. (See *Ung v. Koehler, supra*, 135 Cal.App.4th 186, 202.) There are no " ' "clear, understandable, unmistakable terms" ' " within the statute that evidences legislative intent to create a private cause of action as Jimenez suggests. (See *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597.) We conclude Jimenez has not alleged an actual controversy to maintain a cause of action for her requested declaratory relief.

C. Violation of Rosenthal Act Cause of Action (as to CRC)

The Rosenthal Act protects consumers from unfair or deceptive debt collection acts and practices for "consumer debts," created through transactions in which "property,

services or money is acquired on credit . . . primarily for personal, family, or household purposes." (§§ 1788.1, 1788.2 subds. (e)-(f).) Under the Act, a "debt collector" is defined as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." (§ 1788.2, subd. (c).)

In support of her Rosenthal Act cause of action, Jimenez alleges CRC and Chase are "debt collectors within the meaning of the [Act]" and that Chase's March 31, 2009 letter and CRC's Notice of Default were attempts to collect a debt in violation of section 1788.10, subdivision (e)⁸ "in that they constitute an implied threat to sell the property, which is not permitted by law because, on information and belief, defendants were not authorized by the Note's rightful owner to foreclose on the property." Jimenez alleges the violations were willful and knowing. In its demurrer, CRC argued Jimenez failed to allege any harassing or threatening conduct, obscenity, misleading or false communications or any communications to third parties such as employers. It argued Jimenez's allegations as to the absence of CRC's authority to foreclose were contrary to the documents it sought to judicially notice.

On appeal, Jimenez apparently rests her argument on the impropriety of taking judicial notice of CRC's status as the beneficial holder of the promissory note. She does not otherwise describe the Rosenthal Act's elements or explain how her allegations state a

⁸ Section 1788.10, subdivision (e) prohibits any debt collector from collecting or attempting to collect a consumer debt by means of the following conduct: "The threat to any person that nonpayment of the consumer debt may result in the arrest of the debtor or the seizure, garnishment, attachment or sale of any property or the garnishment or attachment of wages of the debtor, unless such action is in fact contemplated by the debt collector and permitted by law" (§ 1788.10, subd. (e).)

cause of action under the Act. For its part, CRC responds for the first time on appeal that foreclosure of a loan is not "debt collection" under the Act. It cites federal cases involving the federal Fair Debt Collection Practices Act (FFDCPA, 15 U.S.C. §§ 1692-1692).

Jimenez's Rosenthal Act claim falls on the premise alleged in her complaint that MERS had no authority to assign the promissory note, which assertedly invalidated CRC's beneficial interest and ability to initiate foreclosure proceedings. As we have held, that premise is contradicted by the deed of trust granting MERS broad powers. Because the absence of MERS's authority is the underlying basis for her cause of action under the Act, we conclude she cannot state a cause of action under the Act as a matter of law.

DISPOSITION

The judgments are affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.